THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROGER and JANET STEGALL, husband and wife, and the marital community composed thereof, Plaintiffs, v. HARTFORD UNDERWRITERS INSURANCE COMPANY, an insurance company, Defendant.	No.: C08-668MJP HARTFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: EXTRA-CONTRACTUAL CLAIMS AND ATTORNEY FEES **NOTED: March 13, 2009** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

In December 2006, Plaintiffs suffered a wind-related property loss. In January 2007, Plaintiffs accepted Hartford's payment for the actual cash value of their loss and for temporary repairs to their home. Plaintiffs contacted Hartford only once with questions about the claim, which Hartford explained. Before filing this lawsuit, Plaintiffs did not contact Hartford again and never asserted that Hartford's payment was insufficient to repair the damage. Instead, Plaintiffs filed suit on December 13, 2007. By admissions of Plaintiffs and their attorneys, Plaintiffs filed suit because they believed that the contractual suit

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

limitation clause required that they file suit within one year of the loss.[1]

In fact, the suit limitation period is two years. So, instead of giving Hartford a reasonable opportunity to adjust their insurance claim to correct any perceived deficiencies in the claim adjustment and payment, Plaintiffs jumped the gun and sued Hartford, alleging breach of contract and extra-contractual violations. In doing so, they have incurred exorbitant attorney fees, which will only be paid if Plaintiffs convince the Court to excuse their mistakes, including the mistake in filing suit in the first place, and to assign extra-contractual liability to the claim-handling process. These are the only claims that remain against Hartford, because the contract claim settled in mediation.

Plaintiffs are not entitled to recover their attorney fees under any theory of recovery. Plaintiffs are not entitled to collect under *Olympic Steamship* because Hartford did not dispute coverage and did not compel Plaintiffs to sue. Plaintiffs are not entitled to recover attorney fees, or other damages, on their bad faith or Consumer Protection Act ("CPA") claims because Hartford did not violate the Washington Administrative Code ("WAC"), did not act unreasonably under the circumstances, and did not cause Plaintiffs any harm. Plaintiffs are not entitled to recover on their claim for violation of the Washington Insurance Fair Conduct Act ("WIFCA") because WIFCA became effective almost a year after Plaintiffs' claim was paid and closed, and WIFCA does not apply retroactively.

II. RELIEF REQUESTED

Hartford respectfully asks the Court to order that: **(1)** Hartford is not liable to Plaintiffs for attorney fees under *Olympic Steamship*; **(2)** Hartford is not liable to Plaintiffs for extra-contractual damages under the CPA, bad faith, or WIFCA; and **(3)** that Plaintiffs

[1] Plaintiffs filed a motion for partial summary judgment asking the Court to find that Hartford violated the Washington Administrative Code ("WAC") and was liable for extra-contractual damages for failure to notify Plaintiffs of the suit limitation clause, which they thought was one year. Apparently, neither Plaintiffs nor their attorneys read the insurance policy. After Hartford incurred the expense of responding to the motion, Plaintiffs withdrew the motion.

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

extra-contractual claims based on WIFCA, CPA, and bad faith are dismissed, with prejudice.

III. FACTS

A. Plaintiffs' Claim and Hartford's Claim-Handling[2]

In December 2006, Western Washington suffered the effects of a windstorm that damaged many properties. On December 15, Plaintiffs' home was damaged. Because of the volume of claims related to the storm, Hartford categorized the storm as a "catastrophe storm."[3] The relevant claim-handling facts are set forth in the following timeline:

12/15/2006 Plaintiffs notified Hartford of the loss.

12/18/2006 Hartford assigned adjuster Michelle Stevens to handle the claim. Stevens called Plaintiffs, and assigned independent adjusters ("IAs") from Reid, Jones, McRorie & Williams, Inc. ("RJMW") to inspect the damage.

Chuck Fretwell of RJMW contacted Plaintiffs and scheduled the inspection of their home.

12/19/2006 Plaintiffs notified Stevens that roofers were making temporary repairs.

12/20/2006 A Hartford supervisor reviewed the claim file and noted that the IA's report was pending.

12/22/2006 Fretwell, along with adjuster Mark Olle, inspected Plaintiffs' home.[4]

12/27/2006 Plaintiffs told Stevens that Fretwell had inspected the damage. Stevens said she would follow up after she received Fretwell's report.

Plaintiffs attempted to email photographs and the bill from the roofing company to Fretwell.[5]

---

[2] Unless otherwise indicated, these facts are taken from Hartford's ciWeb claim notes (**Pages 4-8** to the Declaration of Toni Y. Anders in Support of Hartford's Motion for Partial Summary Judgment ("Anders Decl.").

[3] Excerpt from Deposition Transcript of Michelle Stevens, 12:2-7 (**Page 10** to Anders Decl.).

[4] Declaration of Charles Fretwell, ¶ 2.

[5] December 27, 2006, email message from Plaintiffs to Fretwell (**Pages 17-18** to Anders Decl.).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

12/28/2006 Plaintiffs obtained a $2,500 estimate for roof damage.[6]

Fretwell responded to Plaintiffs' email message letting Plaintiffs know that he did not receive pictures or an estimate.[7]

1/3/2007 Plaintiffs sent email message to Fretwell apologizing that pictures did not transmit and agreeing to get "other estimates" to Fretwell "in the next couple of days."[8]

1/4/2007 Plaintiffs' daughter emailed Fretwell with one photograph of Plaintiffs' damages.[9]

1/18/2007 A Hartford supervisor reviewed the claim file and sent a message to Stevens that she should contact Fretwell and "motivate" the estimate.

1/24/2007 Stevens called Fretwell and left a message.

Plaintiffs called regarding status of Fretwell's estimate and to say that they had an opportunity to schedule roof repairs.

Stevens received and reviewed Fretwell's estimate, and called Plaintiffs to explain estimate. Plaintiffs agreed to fax bill for temporary repairs. Stevens faxed estimate to Plaintiffs.

Hartford paid Plaintiffs the actual cash value of the loss.

1/25/2007 Stevens received invoice and paid for temporary repairs.

1/29/2007 Plaintiffs called Hartford and spoke with Jessica Charmack. Charmack noted that Plaintiffs were upset and believed the check did not include payment for all damages, including temporary repairs and $2,500 for roof repairs. Charmack told Plaintiffs that check for temporary repairs had been mailed. Charmack also said she would send a note to adjuster to advise adjuster of Plaintiffs' concerns.

Charmack sent a note to Stevens. Stevens called Plaintiffs and explained estimate again. Stevens explained depreciation and how

---

[6] December 28, 2006, estimate from T&W Roofing & Siding, Co. (**Page 19** to Anders Decl.).

[7] December 28, 2006, email message from Fretwell to Plaintiffs (**Page 17** to Anders Decl.).

[8] January 3, 2007, email message from Plaintiffs to Fretwell (**Page 17** to Anders Decl.).

[9] January 4, 2007, email message from Janinne Armstrong to Fretwell (**Page 20** to Anders Decl).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

Plaintiffs could recover the depreciation holdback

Stevens faxed replacement cost letter and estimate to Plaintiffs.

1/30/2007 Stevens called Plaintiffs again regarding depreciation holdback and recovery.

12/12/2007 Plaintiffs obtained an estimate from Alliance Restoration Services, Inc.[10]

12/13/2007 Plaintiffs sued Hartford.

B. Post-Litigation Damage Investigation

1. Attorney Fees

On February 6 and February 25, 2008, counsel for Hartford requested information from regarding damages.[11] On March 14, Plaintiffs' counsel provided a written settlement demand, which included a copy of the Alliance and RJMW estimates.[12] At that time, Plaintiffs claimed attorney fees of $10,000.[13] On March 27, Plaintiffs submitted notice to Hartford of their intent to file a claim under WIFCA.[14] At this time, Plaintiffs claimed attorney fees were $14,805. On August 21, 2008, before mediation, before any depositions were taken, and before any motions were filed, Plaintiffs' counsel notified Hartford's counsel that attorney fees were $59,900.[15]

---

[10] Alliance Estimate (**Pages 21-24** to Anders Decl.).

[11] February 6, 2008, and February 25, 2008, email messages from Toni Anders to Timothy Bearb (**Pages 25** and **26** to Anders Decl.

[12] March 14, 2008, letter, without attachments, from Timothy Bearb to Toni Anders (**Pages 27-30** to Anders Decl.). The March 14 letter is identified as an ER 408 communication. Hartford is not offering this letter, or any other purported Rule 408 communication, into evidence for any of the uses prohibited by Rule 408.

[13] *Id.* at **Page 29**.

[14] March 27, 2008, letter from Timothy Bearb to Toni Anders, copied to the Insurance Commissioner (**Pages 31-40** to Anders Decl.).

[15] August 21, 2008, letter from Michael Watkins to Toni Anders (**Pages 41-42** to Anders Decl.).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

2. Property Damage

The Alliance estimate for repair of Plaintiffs' damages exceeded the estimate prepared by Fretwell by approximately $3,800.[16] In addition, the Alliance estimate did not appear to include some of the damages at issue. For example, there was no cost allocation for an awning Plaintiffs claimed was damaged or for the garage flat roof.[17] Because of the discrepancies between Hartford's and Plaintiffs' estimates, Hartford retained Jim Perrault of JRP Engineering to assist it in assessing Plaintiffs' damages. On April 8, Hartford notified Plaintiffs of its expert selection, and Perrault inspected the property on April 29, 2008.[18] On July 3, 2008, Perrault provided his written report.[19]

On July 14, Hartford requested Plaintiffs' permission to have a contractor of Hartford's choice visit the insured's home and write an estimate for repairs based on Perrault's engineering report.[20] The Plaintiffs did not agree to Hartford's proposal. Instead, Plaintiffs proposed that either Hartford or Plaintiffs choose one of three contractors selected by the other party.[21] Hartford offered Plaintiffs three contractors from which to choose.[22] Plaintiffs selected the company (McBride Construction) and the individual contractor for the job,[23] and the inspection was scheduled for August 14, 2008. Counsel received McBride's estimate on September 10, 2008, the day of mediation.

---

[16] The Alliance estimate totaled $16,436.12, which included $4,500 in taxes, insurance, permits and fees. Fretwell's estimate, without taxes, insurance, permits, and fees, totaled $8,086.39, for a difference of $3,849.78.

[17] *See* Alliance Estimate.

[18] Report from JRP Engineering (**Pages 43-57** to Anders Decl.).

[19] *Id.*

[20] July 14, 2008, email message from Toni Anders to Timothy Bearb (**Pages 58-59** to Anders Decl.).

[21] July 17, 2008, email message from Timothy Bearb to Toni Anders (**Page** 58 to Anders Decl.).

[22] July 25, 2008, letter from Toni Anders to Timothy Bearb (**Page 60** to Anders Decl.).

[23] July 28, 2008, letter from Timothy Bearb to Toni Anders (**Page 61** to Anders Decl.).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

Based on Perrault's report, which included damages Plaintiffs had not discussed with Hartford or Alliance, McBride's estimate for repairs exceeded the estimates from Alliance and RJMW. The parties settled the property damage portion of this lawsuit in mediation based, in part, on the McBride estimate.

IV. ISSUES PRESENTED

1. Under *Olympic Steamship*, an insured is entitled to recover attorney fees if coverage is at issue, and the insurer compels the insured to sue to recover benefits under the policy. Hartford accepted coverage for Plaintiffs loss. And, Plaintiffs sued under the mistaken belief that they had one year to do so. Should Plaintiffs recover attorney fees under *Olympic Steamship*?

2. Should the Court dismiss Plaintiffs extra-contractual claims because, as a matter of law, (1) Hartford did not violate the WAC in its claim-handling; (2) Hartford behaved reasonably under the circumstances; and (3) Plaintiffs were not harmed by Hartford's actions?

3. WIFCA became effective December 6, 2007, and applies prospectively only. Plaintiffs' claim was paid and closed by January 30, 2007. Should the Court dismiss Plaintiffs WIFCA claim because WIFCA was not effective during the handling of Plaintiffs's claim.

V. EVIDENCE RELIED UPON

1. Declaration of Toni Y. Anders in Support of Hartford's Motion for Partial Summary Judgment, with **Pages 4-103**.

2. Declaration of Charles Fretwell in Support of Hartford's Motion for Partial Summary Judgment.

VI. ANALYSIS

A. Hartford is entitled to judgment as a matter of law.

A party is entitled to summary judgment when there are no genuine issues of material

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

fact.[24] The moving party has the burden of proving its opponent is not entitled to relief.[25] After the moving party makes the initial showing, the burden shifts to the non-moving party to set forth specific facts sufficient to rebut the moving party's contentions and to establish the existence of genuine issues of material fact.[26] The facts are viewed in the light most favorable to the non-moving party.[27] Hartford is entitled to judgment as a matter of law on all claims.

B. Plaintiffs are not entitled to recover attorney fees under *Olympic Steamship*.

Under Washington law, an insured is entitled to "recoup attorney fees it incurs because an insurer refuses to defend or pay the justified action or claim of the insured[.]"[28] According to the Washington Supreme Court in *Olympic Steamship Co., Inc., v. Centennial Insurance Co.*, "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract[.]"[29] An award of attorney fees is limited to those situations where the insured must litigate coverage issues, not "where the controversy is merely over the amount of, or the denial of, a claim."[30] "Coverage disputes include both cases in which the issue of any coverage is disputed and cases in which 'the extent of the benefit provided by an insurance contract' is at issue."[31]

---

[24] CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

[25] *Hiatt v. Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

[26] *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[27] *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

[28] *Olympic S.S. Co., Inc., v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991).

[29] *Olympic Steamship*, 117 Wn.2d at 53.

[30] *Leingang v. Pierce County Med. Bur., Inc.*, 131 Wn.2d 133, 146, 930 P.2d 288 (1997) (citing *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280-81, 876 P.2d 896 (1994)).

[31] *Leingang*, 131 Wn.2d at 147 (quoting *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 33, 904 P.2d 731 (1995)).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

Hartford did not dispute coverage or the extent of coverage available. Hartford accepted coverage and paid Plaintiffs' claim, with the exception of the depreciation holdback, which was authorized by the following policy language:

> You may disregard Paragraphs **a.** and **b.** above and make a claim for loss on an "actual cash value" basis and then make a claim for any additional liability in accordance with this endorsement, provided you notify us of your intent to do so within 180 days after the date of loss.[32]

Plaintiffs were entitled to collect the replacement cost at the time of the loss, without deduction for depreciation. However, if the cost to repair exceeded $500, Plaintiffs were only entitled to the actual cash value amount of loss until the actual repair or replacement is complete.[33] Plaintiffs never notified Hartford that repairs were complete. In fact, repairs had not been completed by the time Plaintiffs filed suit.[34]

Moreover, Hartford did not ***compel*** Plaintiffs to file suit. They filed suit under the mistaken belief that they had to do so by December 15, 2007, when, in fact, the suit limitation clause provided a two-year limitation period. Timothy Bearb admitted on April 28, 2008, that Plaintiffs filed suit "to protect the Stegalls' rights vis a vis the one-year statutory suit deadline[.]"[35] Mrs. Stegall admitted that Plaintiffs did not contact Hartford after they received the Alliance estimate because they thought they had to file suit by December 15, 2007. Significantly, she said they would not have filed suit if they knew they had two years to do so:

> Q. After you got that estimate, why didn't you just send it to

---

[32] Excerpt from Endorsement HO 46 90 06 05 (**Pages 62-63** to Anders Decl.).

[33] *Id.*

[34] Plaintiffs also had not completed repairs by the time of their depositions, which took place after the property damage claim settled in mediation. Excerpt from the deposition of Roger Stegall, 16:4 -5 (**Page 65** to Anders Decl.)

[35] April 28, 2008, email message from Timothy Bearb to Toni Anders (**Page 66** to Anders Decl.).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

Hartford instead of filing suit.

A. I think I had called them and I did – I thought I had called them and told them about the amount, but I don't know. I really –I think it had to do with time. It – suit would be notification.

. . .

Q. So you thought you had one year to file suit? But you know now it was two years, right?

A. No, I still didn't know that until you just told me, if that's what I have.

Q. Okay. So the reason you didn't contact them with that estimate is because you thought time was running out and you needed to file suit.

A. Right, exactly.

Q. If you had known at the time that you actually had another full year, would you have contacted them instead of filing suit?

A. Yeah.[36]

Based on the indisputable evidence, there was no coverage dispute. In addition, Plaintiffs' own mistake made them file suit, not any actions on Hartford's part in denying that coverage existed for the loss, or the extent of coverage for the loss. Therefore, Hartford is entitled to judgment that Plaintiffs are not entitled to attorney fees under *Olympic Steamship*.

C. <u>Plaintiffs are not entitled to recover damages on their extra-contractual damages.</u>

1. Hartford did not commit bad faith[37] or violate the CPA.

a. Bad Faith and CPA, Generally

An insurer's good faith duty to its insureds is often mistakenly called a "fiduciary"

---

[36] Excerpts from Deposition Transcript of Janet Stegall, 40:12 to 41:7 (**Page 69** to Anders Decl.).

[37] In his April 28, 2008, Timothy Bearb stated that Plaintiffs intended to withdraw their bad faith claim. However, Plaintiffs never did so.

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

duty, although it is at most a "quasi-fiduciary" duty. The difference is that a fiduciary requires the one having the duty to put the interests of the beneficiary ahead of its own interests.[38] An insurer, by contrast, must give the insured's interests ***equal*** consideration, not more consideration.[39] That is the essence of the good faith obligation and differs from other contractual relationships, in which a person may favor his own interests. An insurer does not commit bad faith unless its conduct is frivolous and unfounded.[40]

An insurer does not breach the covenant of good faith simply by violating the WAC. Rather, a WAC violation "establishes a breach of duty," for purposes of a bad faith cause of action.[41] The insured must still prove the remaining elements, including harm and an unreasonable, frivolous, unfounded violation, which are essential elements of a bad faith claim.[42]

To establish a claim for violation of the CPA, a plaintiff must prove: (1) unfair or deceptive acts (2) occurring in trade or commerce, (3) which impact the public interest, and (4) cause (5) injury to the plaintiff's business or property.[43] A plaintiff must satisfy all five

---

[38] *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992).

[39] *Id.*; *see also Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 177, 473 P.2d 193 (1970) (an insurer must give equal consideration to the insured's interests); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986).

[40] *Ins. Co. of the State of Penn. v. Highlands Ins. Co.*, 59 Wn. App. 782, 786, 801 P.2d 284 (1990) ("ICSOP") (citing *Miller v. Ind. Ins. Cos.*, 31 Wn. App. 475, 642 P.2d 769 (1982)); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

[41] *Am. Mfrgs. Mut. Ins. Co v. Osborn*, 104 Wn. App. 686, 697-98, 17 P.3d 1229 (2001).

[42] *Id.* at 698; *Butler*, 118 Wn.2d at 389; *Coventry Assocs. V. Am. States Ins. Co.*, 136 Wn.2d 269, 276, 961 P.2d 933 (1998); *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 147, 29 P.3d 777 (2001); *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593 (2005); *ICSOP*, 59 Wn. App. at 786 (citing *Miller*, 31 Wn. App 475); *Kirk*, 134 Wn.2d at 5609; *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003).

[43] *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-785, 719 P.2d 531 (1986).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

elements, and failure to prove even one element is fatal.[44]

An insured may establish an unfair or deceptive act by proving that the insured violated the WAC. According to the Court of Appeals in *Anderson v. State Farm Mutual Insurance Co.*, "[a] single violation of any of the provisions under 284-30-330 constitutes a per se ***unfair or deceptive practice*** for purposes of a Consumer Protection Act violation."[45] In *American Manufacturers Mutual Insurance Co v. Osborn*, where the court listed the elements of a CPA claim and said that "[t]he insured may establish the ***first element*** by showing a violation of any subsection of WAC 284-30-330.[46]

b. Hartford did not violate the WAC.

The following WAC violations form the basis of Plaintiffs' remaining extra-contractual claims:

> (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
>
> (4) Refusing to pay claims without conducting a reasonable investigation.
>
> . . .
>
> (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonable clear. . . .
>
> (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.[47]

---

[44] *Hangman*, 105 Wn.2d at 792; *Butler*, 118 Wn.2d at 389.

[45] 101 Wn. App. 323, 332, 2 P.3d 1029 (2000) (emphasis added).

[46] 104 Wn. App. at 687 (emphasis added).

[47] Excerpts from Plaintiffs Supplemental Discovery Responses (**Pages 72-74** to Anders Decl.). The remaining alleged violations have been voluntarily abandoned (suit limitation) or disposed of by the Court (failure to respond to communications).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

Plaintiffs also claim Hartford violated WAC 284-30-370, which provides:

> Every insurer shall complete investigation of a claim within thirty days after notification of the claim, unless such investigation cannot reasonably be completed within such time. All persons involved in the investigation shall provide reasonable assistance to the insurer in order to facility compliance with this provision.

Plaintiffs cannot establish extra-contractual liability on the part of Hartford based on any of these WAC provisions.

First, Plaintiffs have not presented any evidence that Hartford violated WAC 284-30-330(3). Hartford's expert opined that Hartford's claims handling was prompt and responsive, including that Fretwell's inspection was appropriate for the information provided to him by Hartford and Plaintiffs.[48] Plaintiffs' expert concluded that "Hartford failed to implement reasonable standards for the prompt investigation of such a supplemental claim" because Plaintiffs contacted Hartford and complained of "potentially covered but unestimated damage."[49] Plaintiffs' expert did not support this statement with any evidence, and he did not identify what Hartford's investigation standards are. Moreover, Plaintiffs do not otherwise offer evidence of the reasonable standards.

Complaints about the way a claim was handled or how payment was issued are insufficient evidence of an insurer's standards. In *American Manufactures Mutual Ins. Co. v. Osborn*, the insured complained that the insurer "dribbled payments" to her over a long period of time and, therefore, failed to implement reasonable standards for a prompt investigation of claims.[50] The court held that the claim for this WAC violation was properly dismissed because the insured failed to present evidence to support the claim, and that her

---

[48] Report of William Ballard(**Pages 76-85** to Anders Decl.).

[49] Report of David Mandt (**Pages 86-100** to Anders Decl.).

[50] 104 Wn. App. 686, 698, 17 P.3d 1229 (2001).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

complaints regarding payments was "not evidence of AAMI's investigation standards."[51] Likewise, Plaintiffs complaints about how Hartford handled this particular claim are not evidence of Hartford's investigation standards.

Second, Plaintiffs cannot establish a violation of WAC 284-30-330(4), because there is no evidence that Hartford refused to pay Plaintiffs' claim, and because Hartford's conduct was reasonable. Hartford never refused to pay Plaintiffs' claim. Hartford acknowledged coverage, paid for temporary repairs, paid the actual cash value based on Fretwell's estimate, and explained to Plaintiffs how they could recover the depreciation holdback. Depreciation was never recovered by Plaintiffs because they never notified Hartford that repairs had been completed.

Even after Mrs. Stegall called Hartford on January 29, Hartford did not refuse to make additional payments. Stevens explained the estimate to Mrs. Stegall and believed Mrs. Stegall understood.[52] Stevens testified that she would have considered any additional estimate Plaintiffs provided.[53] However, Plaintiffs never provided an estimate until March 2008, months ***after*** they prematurely and unnecessarily filed suit. Because Hartford never refused to pay the claim, Hartford did not violate WAC 284-30-330(4).

Plaintiffs' expert opined that Hartford's failure to schedule a re-inspection of the loss amounts to a failure to conduct a reasonable investigation.[54] Hartford's expert disagrees.[55] In fact, Hartford's expert opines that any supplemental damage could have been paid had the insureds simply followed up with Hartford after January 29, 2007. According to Stevens,

---

[51] *Id.*

[52] Excerpts from Deposition Transcript of Michelle Stevens, 34:3 to 35:19 (**Pages 12-13** to Anders Decl.).

[53] *Id.* at 39:9-18.

[54] *See* Mandt's report at **Page 94**.

[55] *See* Ballard's report at **Pages 80-81**.

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

scheduling a re-inspection was one of several options Hartford would have had had Plaintiffs provided Hartford with the $2,500 estimate they obtained in 2007.[56]

Hartford's investigation shows that it promptly responded to the claim notice, promptly assigned an IA to inspect the damage, and promptly paid for damages when presented with estimates and bills. In the midst of a large volume of catastrophe claims and over the holiday season, Plaintiffs claim was inspected and paid within 40 days from the date of the loss. Plaintiffs were notified within 30 days the claim needed more time. Plaintiffs' expert opined that:

> They [Hartford] were very prompt in responding to telephone calls. They paid the amount of the estimate from Mr. Fretwell in a timely manner. They paid the – so far as I can tell, they paid the temporary repairs in a timely manner. They had very good, very quick internal communication from the adjuster to the supervisor and back again. The telephone message taken from Ms. Charmack was channeled to Ms. Stevens in a very timely planner [sic], and she responded quite timely.
>
> So I think, in general, the timeliness of their handling was good.[57]

In light of Hartford's expert opinion that Hartford's investigation was reasonable, and all the things Plaintiffs' expert admitted Hartford did correctly, it cannot be said that Hartford's investigation was anything but reasonable, especially when Hartford did not have the benefit of the $2,500 estimate in Plaintiffs' possession. The opinion of Plaintiffs' expert ignores the reciprocal nature of the duty of good faith[58] and the insureds' obligation to cooperate with their insurer. Plaintiffs' expert opined that Plaintiffs had no duty to provide

---

[56] Stevens Deposition Testimony, 48:15 to 49:23 at **Pages 15-16**. There is some indication that in December 27, 2007, Plaintiffs attempted to send a bill and photographs to Fretwell. Hartford assumes the "bill" was for temporary repairs and not the $2,500 estimate, because the $2,500 estimate was not obtained until the following day. However, there is no indication that the Plaintiffs ever sent the $2,500 estimate to Fretwell or Hartford, and Stevens testified that she never received it. Excerpts from Stevens's Deposition, ___

[57] Excerpts from Mandt's deposition, 73:10-20 (**Page 103** to Anders Decl.).

[58] RCW 48.01.030.

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

Hartford with a copy of the $2,500 estimate. According to him, it was the "insured's option."[59] Consistent with Washington law, Hartford's expert opined that it was the insured's responsibility to establish damages. Even if Hartford overlooked a re-inspection, that does not serve as the basis for a claim-handling violation when the insureds admit they did nothing to bring the matter to Hartford's attention for resolutioin.

Third, for the reasons set for above, Plaintiffs cannot show that Hartford failed to attempt in good faith to effective a prompt, fair, and equitable settlement of Plaintffs' claim. Their own expert says payment was prompt. The question is whether it was fair and equitable. Hartford did not violate WAC 284-30-330(6) as a matter of law because it paid according to an estimate it received from an IA who visited the loss location. It is against the notion of good faith to hold Hartford liable for WAC violations when it relied upon an uncontested estimate from an IA, when Plaintiffs could easily have provided Hartford with evidence to suggest that there were deficiencies in that estimate.

Fourth, in Plaintiffs discovery responses, they cite to WAC 284-30-330(7) as a basis for their extra-contractual claims. However, they have not provided any evidence to support their claim. Their expert did not opine that Hartford violated this provision. His opinions were based exclusively on WAC 284-30-330(3) and (4).

Presumably, Plaintiffs will argue that because they recovered more at mediation than was initially paid by Hartford, Plaintiffs allege that Hartford compelled them to litigate. As previously stated, Hartford did not compel Plaintiffs to sue; they sued by mistake, thinking they were running out of time to do so. In addition, under Washington law, "the difference in the amount of the offer and the amount of the eventual settlement does not, by itself, show that the insurer acted in bad faith or engaged in an unfair practice."[60] "Rather, the issue turns

---

[59] Deposition of Mandt, 68:18-21 (**Page 102** to Anders Decl).

[60] *Anderson v. State Farm Mut'l Ins. Co.*, 101 Wn. App. at 335 (citing *Keller v. Allstate*, 81 Wn. App. 624, 633, 915 P.2d 1140 (1996)).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

on whether the insurer had a reasonable justification for its low settlement offer."[61]

Here, that Hartford settled this claim in litigation for more than was initially estimated by Frewell is not evidence of a WAC violation. Hartford's payment was reasonably based on Fretwell's estimate. Plaintiffs had not provided a contradictory or supplementary estimate, and seemed to understand and accept Stevens's explanation of Fretwell's estimate. Moreover at the time McBride estimated damages according to the Perrault report, the insureds had identified damage that they never before mentioned to Hartford or, apparently, Alliance.[62]

Finally, Plaintiffs have not provided any evidence to support their claim that Hartford violated WAC 284-30-370. Under this provision, an insurer is not required absolutely to complete its investigation with 30 days. Rather, an insurer is required to complete the investigation within 30 days if it is reasonable to do so. Again, Plaintiffs' expert does not allege a violation of this WAC provision.

Because of the catastrophic nature of the windstorm and resulting claims, Fretwell was not able to get his report to Hartford by January 15, i.e. 30 days after the loss was reported, so that Hartford could conclude its investigation. It was not reasonable for him to do so because of the volume of claims being filed and investigated in Western Washington at the time, the Christmas and New Year's holidays, and because, as late as January 4, 2007, he was still communicating with Plaintiffs' by email regarding their damage.

Although it took Hartford 40 days to complete its investigation and pay the claim, Hartford notified Plaintiffs within 30 days that more time was needed.

c. Hartford's conduct was reasonable.

Even if Hartford violated the technical requirements of one of the WAC provisions

---

[61] *Anderson*, 101 Wn. App. at 335 (citing *Keller*, 81 Wn. App. at 634-35).

[62] *See* Ballard Report at **Pages 79-80** and **84-85**.

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

identified above by committing procedural missteps, these missteps do not amount to an unfair or deceptive act under the CPA or bad faith. In *Insurance Co. of the State of Pennsylvania v. Highlands Insurance Co. ("ICSOP")*, the appeals court found no CPA violation under circumstances where the insurer was accused of not communicating in a timely manner with the insured.[63] The court said:

> Most of the acts the County identifies as pertinent to Highlands' behavior are policed by a standard of reasonableness. Communication must be reasonably prompt. WAC 284-30-330(2). Claims investigations must be reasonable. WAC 284-30-330(4). Affirming or denying claims coverage must occur within a reasonable time of proof of loss. WAC 284-30-330(5). . . . Denial of a claim must be prompt and carry a reasonable explanation of the basis for the decision. WAC 284-30-330(13). We noted earlier that Highlands' conduct was clumsy. Nevertheless, its behavior in sorting out responsibility and meeting the County's defense costs in this complicated case was not unreasonable.[64]

Eleven years later, the Court of Appeals held that "RCW 19.86.920 imports the reasonableness standard into the CPA as a whole," even if the WAC does not contain a specific reasonableness requirement:

> It is, however, the intent of the legislature that *this act shall not be construed to prohibit acts or practices which are reasonable* in relation to the development and preservation of business or which are not injurious to the public interest[.][65]

Based on this authority (and the plain language of 284-30-330(2)), both regulations carry a reasonableness standard.

As explained above and as stated in Mr. Ballard's expert report, Hartford's actions were reasonable. Even Plaintiffs own experts identify many things Hartford did correctly during the investigation. What is unreasonable is the notion that Plaintiffs can obtain and

---

[63] 59 Wn. App. at 784.

[64] *Id.* at 789.

[65] *Osborn*, 104 Wn. App. at 699 (emphasis in original).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

estimate that they believe establishes more damage than was estimated by Hartford, never provide it to Hartford to establish the existence of unestimated damage, sue Hartford because they misunderstood the suit limitation provision, and expect Hartford to pay six-figure attorney fees on a claim that could have been resolved during the claim process.

Even if Stevens made a mistake by not immediately scheduling a re-inspection, that mistake is not actionable. The Washington Supreme Court recognizes that insurers sometimes make mistakes:

> Of course, insurance companies, like every other organization, are going to make some mistakes. As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or CPA claim against its insurer on the basis of a *good* faith mistake.[66]

Stevens assumed, as was reasonable to do, that the insureds would provide copies of estimates. By making this assumption, Stevens did not overemphasize Hartford's interests. Rather, she wrongly assumed Plaintiffs would cooperate in the claims process. Plaintiffs had in their hands all the information they needed to justify, as they believed, their entitlement to more money. They chose to only do it after they filed suit.

d. Hartford did not injure Plaintiffs.

Harm is an essential element of claims for violation of the CPA and breach of the covenant of good faith.[67] Plaintiffs were not harmed by any conduct on Hartford's part. That Plaintiffs were unable to quickly repair the damage to their home is a function of timing and their own choices. Plaintiffs testified that it was difficult to get a contractor to prepare an estimate because they were all busy with the storm.[68] And, Plaintiffs chose to do nothing for

---

[66] *Coventry Assocs.* 136 Wn.2d at 280.

[67] *Butler*, 118 Wn.2d at 389; *Coventry Assocs.*, 136 Wn.2d at 276; *Griffin*, 108 Wn. App. at 147; *Werlinger*, 129 Wn. App. at 808.

[68] Excerpts from Janet Stegall's Deposition, 15:6-10 (**Page 68** to Anders Decl.).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

almost a year to document the existence of additional damages. They waited until they believed (incorrectly) that they had no choice except to file suit. Moreover, it is questionable whether Plaintiffs would have quickly repaired their damage had they immediately received all the money to which they claimed they were entitled. At the time of their depositions, after Hartford had settled the contract claim, Plaintiffs still had not completed the repairs.

Any harm Plaintiffs may have suffered could have been eliminated had Plaintiffs allowed the claim process to take place. Instead, they filed a premature lawsuit even Mrs. Stegall admitted would not have been filed had they known they had two years to do so. Any harm suffered by Plaintiffs is of their own making.

D. Plaintiffs are not entitled to recover under WIFCA because WIFCA was not effective during the handling of Plaintiffs' claim.

WIFCA became effective on December 6, 2007, almost 11 after Hartford paid Plaintiffs claim and closed the file. Hartford paid Plaintiffs claim on January 24, 2007, and closed the claim shortly thereafter.[69] Courts addressing WIFCA have uniformly held it does not apply retroactively. These holdings are correct because "as a general proposition, courts disfavor retroactivity."[70] A statutory amendment "is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively."[71] WIFCA contains no suggestion it was intended to apply in any manner but prospectively.

The presumption against retroactivity may be overcome only if (1) the statute itself indicates it is to be applied retroactively, (2) the amendment is curative, or (3) the statute is

---

[69] Plaintiffs argue that the claim was reopened after litigation began. This argument was not persuasive to the Court on Plaintiffs' motion for reconsideration and should not be persuasive here. The claim was never reopened for claim handling. Stevens is still the handler, and testified that she did not perform any additional claim activities after it was closed. The testified that the claim appears to have been reopened for purposes of issuing payments during litigation.

[70] *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007) (citing *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999)); *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

[71] *Densley*, 162 Wn.2d at 233.

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

remedial.[72] A statute is curative if "it clarifies or technically corrects an ambiguous statute."[73] Intent to clarify a statute may be manifested by the legislature's enactment of new legislation soon after a controversy arose about interpretation of the statute said to be clarified.[74] A remedial statute "relates to practice, procedures and remedies" and does not affect a substantive or vested right.[75] None of these factors apply to WIFCA, which must be assumed to apply only to claim handling occurring after its effective date.[76]

Because WIFCA did not become effective until long after Plaintiffs' claim was closed, and WIFCA does not apply retroactively, Plaintiffs are not entitled to recovery under WIFCA.

VII. CONCLUSION

Plaintiffs failed to give Hartford an opportunity to resolve their claim during the claim process. Plaintiffs filed suit in error, believing they were running out of time to do so. These mistakes on Plaintiffs' part resulted in this lawsuit and in attorney fees that should never have been incurred. Plaintiffs solely should be responsible for their own mistakes.

Plaintiffs' attorney fees are exorbitant in comparison to the simplicity of Plaintiffs' claim and the fact that there was never a dispute as to coverage, and are all that stand in the way of resolution of this matter entirely. Plaintiffs will never be liable to pay these fees out of pocket; the only chance of recovery of these fees is if Hartford pays them. The Court

---

[72] *Densley*, 162 Wn.2d at 233 (internal citations omitted).

[73] *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (quoting *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992)).

[74] *McGee*, 142 Wn.2d at 325; *Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983). WIFCA also does not apply because Hartford did not deny Plaintiffs' claim or the payment of benefits, unreasonably or otherwise.

[75] *Densley*, 162 Wn.2d at 224 (internal citations omitted); *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984).

[76] *Malbco Holdings, LLC, v. AMCO Ins. Co.*, 546 F. Supp. 2d 1130 (E.D. Wash. 2008).

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

should not find Hartford liable for these fees or for any extra-contractual damages because, as explained above, WIFCA does not apply, Hartford did not violate the WAC, behaved reasonably, and did not harm Plaintiffs.

VIII. ORDER

A proposed Order is attached.

DATED this 17th day of February, 2009.

BULLIVANT HOUSER BAILEY PC

By /s/ Toni Y. Anders
John A. Bennett, WSBA #33214
E-Mail: john.bennett@bullivant.com
Toni Y. Anders, WSBA #31238
E-Mail: toni.anders@bullivant.com

Attorneys for Defendant Hartford Underwriters Insurance Company, an Insurance Company

11267687.1

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2009, I electronically filed the foregoing, Declaration of Toni Y. Anders in Support and Declaration of Chuck Fretwell with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons listed below:

Michael T. Watkins
Timothy A. Bearb
Law Offices of Michael T. Watkins
1100 Dexter Ave. N
Seattle, WA 98109
michael@mtwlawfirm.com
timothy@mtwlawfirm.com

Kimberly A. Fergin

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROGER and JANET STEGALL, husband and wife, and the marital community composed thereof, Plaintiffs, v. HARTFORD UNDERWRITERS INSURANCE COMPANY, an insurance company, Defendant.	No.: C08-668MJP ORDER GRANTING HARTFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE EXTRA-CONTRACTUAL CLAIMS AND ATTORNEY FEES

Defendant moved for partial summary judgment regarding extra-contractual claims and attorney fees, and the parties submitted the following for the Court's consideration:

1. Hartford's Motion for Partial Summary Judgment Re: Extra-Contractual Claims and Attorney Fees;

2. Declaration of Toni Y. Anders in Support, w/exhibits;

3. Declaration of Chuck Fretwell;

5. _____

6. _____

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

The Court having reviewed the submissions of the parties, it is hereby ORDERED that Plaintiffs are not entitled to collect attorney fees under *Olympic Steamship*. It if further ORDERED that:

2. Hartford did not commit bad faith;

3. Hartford did not violate the CPA;

4. The Washington Insurance Fair Conduct Act does not apply because Plaintiffs' insurance claim was concluded before the Act became effective, and the Act applies prospectively only; and

5. All of Plaintiffs' extra-contractual claims are dismissed, with prejudice.

DATED this _____ day of _____, 2008.

JUDGE MARSHA J. PECHMAN

11272020.1

Bullivant|Houser|Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930